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No. 99-1663

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IN THE

Supreme Court of the United States

DISTRICT INTOWN PROPERTIES LIMITED PARTNERSHIP, ET AL.,
Petitioners,

v.

DISTRICT OF COLUMBIA, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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11 pp

TABLE OF AUTHORITIES

Page

Cases:

Andrus v. *Allard*, 44 U.S. 51 (1979) 5
Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust, 508 U.S. 602 (1993) 5
Dolan v. *City of Tigard*, 512 U.S. 374 (1994) 4, 5, 8
Florida Rock Indus., Inc. v. *United States*, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995) 5
Keystone Bituminous Coal Ass'n v. *DeBenedictis*, 480 U.S. 470 (1987) 2, 5
Lucas v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992) 2, 3, 5, 7
Nollan v. *California Coastal Comm'n*, 483 U.S. 825 (1987) 4
Penn Central Transp. Co. v. *New York City*, 438 U.S. 104 (1978) 4, 5

Other Authorities:

James S. Burling, *What if the Government Prohibits the Use of Only Some of Your Property—Has There Been a Regulatory Taking?*, SE18 ALI-ABA 113 (1999) 3
Robert Meltz, *Wetlands Regulation and the Law of Regulatory Takings*, 30 Envtl. L. Rep. 10468 (June 2000) 2
Dwight H. Merriam, *What is the Relevant Parcel in Takings Litigation?*, SC43 ALI-ABA 505 (1998) 2, 3

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1. The first of the two questions presented in the petition asks how courts should identify the relevant parcel of real property for takings purposes when, as here, the property owner owns multiple geographically contiguous tracts, some of which have been rendered valueless by government regulation and some of which have not.

Remarkably little of the District's brief is devoted to the certworthiness, as opposed to the merits, of the relevant parcel issue. In fact, all that the District says on this score is that there is "[n]o relevant split" and are "no significant disagreements" among certain lower courts. Opp. 1, 12. The District's attempt to downplay the importance of the issue is, however, quite unconvincing.

First, over and above any split or disagreement among the lower courts, this Court has itself recognized that the relevant parcel issue is unresolved, difficult, and important. *See Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1016-17 n.7 (1992). When the Court itself acknowledges that "it is unclear [how] we would analyze" the relevant parcel issue on facts similar to the facts of this case; that this issue is a "difficult" one; and that "this uncertainty * * * has produced inconsistent pronouncements by the Court," *id.*, there can be no doubt that the issue is sufficiently important to warrant review by this Court. *See also Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 497 (1987) (determining the relevant parcel is "one of the critical questions" in takings analysis); *id.* at 514-515 (Rehnquist, C.J., dissenting) ("the admittedly difficult task of defining the relevant parcel" is "all important").

Numerous commentators, too, have noted the importance of the issue and called for the Court to resolve it. *See* Pet. 10; *see also* Robert Meltz, *Wetlands Regulation and the Law of Regulatory Takings*, 30 Envtl. L. Rep. 10468, 10479 (June 2000) ("The relevant parcel determination is often a make-or-break one—the litigant that prevails on this issue likely will win on the taking claim."); Dwight H. Merriam, *What is the Relevant Parcel in Takings Litigation?*, SC43 ALI-ABA 505, 544 (1998) ("[A]bsent further clarification from the U.S. Supreme Court [on the relevant parcel issue], it is difficult if not impossible to discern many of the applicable ground rules in regulatory takings law.").

Second, the relevant parcel issue has, in fact, confounded the lower courts, which, as explained in the Petition, are now divided into three competing camps on the issue. *See* Pet. 11-18.[1] Thus, to say that "the lower courts are hopelessly

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[1] The District cites a string of cases (Opp. 12-13) in an attempt to show that the balancing approach utilized by the court below is

split," James S. Burling, *What if the Government Prohibits the Use of Only Some of Your Property—Has There Been a Regulatory Taking?*, SE18 ALI-ABA 113, 119 (1999), is not, as the District claims, an example of "overwrought rhetoric," (Opp. 12)—but a statement of fact. *See also* Merriam, *supra*, at 540-541 (courts "will likely continue to address the relevant parcel issue in disparate fashion. The question is certain to arise with considerable frequency, given its critical importance to resolution of the ultimate issue of taking liability.") (footnote omitted).

2. a. The bulk of the District's brief is dedicated to the proposition that, when performing takings analysis, this Court's cases require consideration of the "parcel as a whole" rather than a portion thereof. *See* Opp. 8-11. But this simply begs the fundamental question in this case—what is the whole parcel? The very argument that petitioners are making is that each of the eight vacant lots comprising the lawn is a distinct parcel that should be analyzed separately for takings purposes—because, among other reasons, the District government granted regulatory approval to subdivide the property into the nine present lots, taxed the eight lots at a higher rate due to their developability, and granted zoning approval for the proposed construction on each of the eight lots. *See* Pet. 20-21; *Lucas*, 505 U.S. at 1016-17 n.7 (suggesting that the relevant parcel be determined based on "whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land" as to which a taking is claimed). Furthermore, it is the eight lots that are burdened by the District's historic landmark designation—a regulation that precludes all development on each of the lots. *See* Pet. 11-12, 18-19.

Accordingly, the asserted " 'parcel-as-a-whole' doctrine" (Opp. 10) does not resolve the issue in this case, which raises

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the dominant approach, but all of the District's cases come from only three jurisdictions.

the antecedent question of how "the parcel" is to be determined. Perhaps takings law "does not divide a *single parcel* into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated," *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 130 (1978) (emphasis added), but petitioners' claim is precisely that they own not a single parcel but nine parcels, and that the District has taken eight of them by denying petitioners the right to put those parcels to any economically valuable use.

For the same reason, the District's contention that this is "not an [sic] case in which petitioners have been denied economically viable use of their property" (Opp. 15) also begs the question. If each of the eight vacant lots is viewed as "the property," petitioners *have* been denied all economically viable use of their property—they have been forced to leave each of those lots in a completely undeveloped state as a grass lawn.

b. In any event, the District's parcel-as-a-whole doctrine simply cannot apply where, as here, the government appropriates—or denies all economically viable use of—a portion of real property contained within a larger tract. In its *Nollan* and *Dolan* cases, the Court made clear that a taking certainly *does* occur when the government requires a landowner to surrender to the public the use of a portion of a single parcel of land. *See Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 831 (1987) ("Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis * * *, we have no doubt there would have been a taking."); *Dolan* v. *City of Tigard*, 512 U.S. 374, 384 (1994) ("Without question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, * * * a taking would have occurred.").

Obviously, the taking of a portion of a parcel cannot be defended on the ground that the whole parcel has not been

taken. As the Federal Circuit has said, "if the Government took just 5 acres [of a 100 acre tract] and left the property owner with 95, there would be no question that the owner was entitled to compensation for the parcel taken." *Florida Rock Indus., Inc.* v. *United States*, 18 F.3d 1560, 1569 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995). *See also Lucas*, 505 U.S. at 1016 n.7 (discussing hypothetical regulation requiring developer "to leave 90% of a rural tract in its natural state"); *id.* at 1019 n.8 (rejecting dissent's "assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation"). Here, the District has denied petitioners all economically viable use of eight of their lots; the fact that they still have a valuable ninth lot does not diminish the Takings Clause violation.

The District's citation of *Dolan* in support of its parcel-as-a-whole doctrine (Opp. 9) is particularly inapt. For it was not the Court, but the *dissent*, in *Dolan* that claimed that "the analysis [must] focus on the impact of the city's action on the entire parcel of private property." 512 U.S. at 400 (Stevens, J., dissenting). And the cases that Justice Stevens cited in support of that claim—*Penn Central Transportation Co.* v. *New York City*, *supra*; *Andrus* v. *Allard*, 44 U.S. 51 (1979); *Keystone Bituminous Coal Association* v. *DeBenedictis*, *supra*; and *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993)—are the very same cases on which the District now relies. *See* Opp. 9-11. Thus, the District is merely recycling an argument and case law that failed to carry the day in *Dolan*.[2]

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[2] In any event, none of these four cases is similar to this case. Although both *Penn Central* and *Keystone* involved real property, neither involved a ban on development of an entire parcel or a portion thereof. Instead, each involved a single parcel as to which it was claimed that certain rights had been taken (in *Penn Central*, air rights; in *Keystone*, mineral rights). And neither *Andrus* nor *Concrete Pipe* involved real property. *Andrus* involved personal

3. The District also seeks to defend the judgment below by observing that, although petitioners have been denied permission to build new townhouses on their property, they have not been restricted in their ability to operate and profit from their apartment building. Opp. 1. But if the District means that a taking cannot occur when the government denies future development plans, but only when it puts a stop to an existing use of land, that is not the law. *Nollan* and *Dolan* again prove the point. The Nollans wanted to replace their small beachfront bungalow with a larger three-bedroom house. Ms. Dolan wanted to replace her existing plumbing and electric supply store with one nearly double the size. And in both cases, the Court held that the State's refusal to permit these development plans violated the Takings Clause. It would have been no answer to say to these property owners that they have not had their existing structures taken from them, and it is no answer to petitioners to say that the District has not taken their apartment building from them.[3]

4. The District states that "petitioners' proposed rejection of the parcel-as-a-whole standard endangers a broad variety of traditional land use planning regulations" (Opp. 14), but the District simply asserts this and never explains why this is so. In any event, as explained above, petitioners contend that each of the eight vacant lots *is* a whole parcel for takings purpose. Finally, as explained in the petition, *see* Pet. 18-19 & n.6, petitioners do not suggest that compensation is necessarily required when the government prohibits devel-

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property (bald eagle feathers), and *Concrete Pipe* involved intangible property (employer pension liability).

[3] Under the District's approach, the District government could have denied petitioners all use of their apartment building and seven of their eight vacant lots without violating the Takings Clause, so long as petitioners were permitted to make valuable use of the smallest of the vacant lots.

opment on property that could not itself be put to an economically productive use.

5. The District's claim (Opp. 16-17) that petitioners lack reasonable, investment-backed expectations—even if it were true (which it is not)—is legally irrelevant. A property owner must demonstrate such expectations to prevail on a claim under the three-factor *Penn Central* test. But under the *per se* rule of *Lucas*, a takings claim is established if it is shown, without more, that the governmental regulation at issue leaves the property with no economically valuable uses. *See Lucas*, 505 U.S. at 1015 ("The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land."); Pet. App. 6a-7a (discussing requirements of *Penn Central* and *Lucas*). Although petitioners brought claims under both *Penn Central* and *Lucas* in the courts below, in this Court they advance only the *Lucas* claim. Under *Lucas*, petitioners have suffered a taking of their property because the District has left their eight vacant lots "without economically beneficial or productive options for [their] use." *Lucas*, 505 U.S. at 1018.

6. The second question presented in the petition relates to the D.C. Circuit's ruling that, even if petitioners were correct on the relevant parcel question, they have nevertheless not been denied all economically valuable use of their eight vacant lots within the meaning of *Lucas*. In its brief, the District suggests for the first time that petitioners might be able to build a tennis court, swimming pool, or ice skating rink on the lots, or put a parking garage underneath the lots. Opp. 18. This suggestion is fanciful at best. As the D.C. Circuit itself noted, "[t]he record contains a finding by the Mayor's agent that *any construction that destroyed the lawn* would be incompatible with the lawn's status as a historic landmark." Pet. App. 13a (emphasis added) (citing D.C. Cir. J.A. 368). And as Judge Williams rightly observed, "[i]t is hard to imagine what 'economically viable' use that con-

straint leaves" apart from "some thoroughly bucolic use." *Id.* at 28a. Petitioners could hardly construct the recreational or parking facilities that the District now suggests without destroying the lawn.

Finally, it is difficult to square the District's new suggestion with its statement earlier in its brief that "it seem[s] more likely than not that construction on at least one recorded lot would be deemed incompatible with the landmark, *no matter what plan is proposed.*" Opp. 8 n.4 (emphasis added).

* * *

This Court has said that the Fifth Amendment's Takings Clause is "as much a part of the Bill of Rights as the First Amendment or Fourth Amendment" and should not "be relegated to the status of a poor relation." *Dolan*, 512 U.S. at 392. The D.C. Circuit's decision in this case, however, bids fair to relegate the Takings Clause to just that status.

For the foregoing reasons, as well as those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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